Goemon America, Inc. *and* Lee-Ann Farrell. Case 1–CA–30076

July 22, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On January 26, 1994, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as clarified below, and to adopt the recommended Order as modified.[2]

In adopting the judge's decision, we find that the credited evidence set forth below clearly establishes that the Respondent, through Restaurant Manager Jenny Hernandez, discharged Lee-Ann Farrell on December 22, 1992.[3] Therefore we find no merit to the Respondent's argument in its exceptions that Farrell quit.

The credited evidence shows that, following a confrontation between Farrell and Vice President Eleanor Arpino around noon on December 22, Hernandez, Farrell's immediate supervisor, met with Farrell several times on that same afternoon. At their first meeting, which occurred in a back room only a few minutes after the Arpino-Farrell confrontation, Hernandez counseled Farrell to stay out of Arpino's way, and also announced that General Manager Scott Hosker wanted to have a meeting with her at 4 o'clock, when her shift ended. Hernandez next spoke with Farrell in the ladies room, and again cautioned Farrell to stay away from Arpino. Farrell replied, ''Well, if I'm going to be fired, then they should fire me now instead of making me work out the rest of the day because I'm going right to the Labor Board.''

The third meeting occurred about 5 minutes later, when Hernandez took Farrell into her office and said, according to the credited testimony:

> I'm so sorry Lee-Ann, I know we're friends, but I don't even know if I should say that, but I had to tell Eleanor what you told me, because if she knew that I knew what you said to me in the bathroom, then, about going to the Labor Board, then I would have been fired *too*. [Emphasis added.]

Farrell then asked,

> Well, am I fired? Am I fired? And she [Hernandez] kept telling me how sorry she was, and I said, ''Well, if I'm fired, I want my checks, I want my checks. I want a copy of the warning I was given yesterday and to cancel my tables or something.''[4]

Hernandez replied, ''Well, let's go talk to Eleanor.'' Farrell declined to talk to Arpino because ''I was very upset. I was crying and I didn't want to let her [Eleanor] see me that way.'' Farrell then went into the bathroom to wipe her face, and ''Jenny came into the bathroom and she was telling me how sorry she was, how sorry she was, and she said, Why don't we go talk to Eleanor?, and I said, I can't talk to Eleanor. I can't even talk to you right now, I'm too hurt.''

Farrell then went near the cashier's desk to wait for her checks and a copy of the warning. Hernandez came by soon thereafter and pulled Farrell into the employee coat room, handed her the warning and one of her paychecks, and said, ''You're not being fired for this warning, you're being fired for the way you spoke to Eleanor.''

We find that Hernandez' statements, quoted above, plainly conveyed to Farrell that she was being discharged, and that Farrell's demand for her paychecks was predicated on her understanding that she was fired. Accordingly, we find no merit in the Respondent's contentions that Farrell was not discharged, but merely quit her employment.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

[1] The Respondent has excepted to some of the judge's credibility findings, and contends that they are a result of bias. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). After a careful examination of the record, we find no merit in the allegation of bias, and we further find no basis for reversing the credibility findings. However, in affirming the judge's credibility findings, we do not rely on his characterization of the court's holding in *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986).

[2] The judge found, inter alia, that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule in its Policies and Procedures Handbook. The General Counsel excepted to the judge's omission of this violation from his conclusions of law, and to his failure to order the Respondent to rescind the rule because maintaining it serves to inhibit employees from engaging in otherwise protected organizational activity. *J. C. Penney Co.*, 266 NLRB 1223, 1224–1225 (1983); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990). We find merit in these exceptions and shall modify the Order and notice accordingly.

[3] Indeed, Hernandez testified that she had authority to discharge restaurant employees and had done so on previous occasions.

[4] Farrell removed her apron at this point, according to the testimony of Hernandez.

orders that the Respondent, Goemon America, Inc., Cambridge, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Rescind the invalid no-solicitation rule contained in its Policies and Procedures Handbook.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage lawful concerted activities of our employees in violation of Section 8(a)(1) of the National Labor Relations Act by discharging them for engaging in concerted activities for their mutual aid and protection.

WE WILL NOT unlawfully discharge employees who represent that they will go to the National Labor Relations Board in violation of Section 8(a)(4) of the National Labor Relations Act.

WE WILL NOT maintain in the Policies and Procedures Handbook a rule prohibiting solicitation in the restaurants by employees and requiring that such activity be reported to managers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Lee-Ann Farrell immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, discharging, if necessary, any employees hired to replace her; WE WILL pay her the backpay she lost with interest because we discriminatorily discharged her.

WE WILL notify Lee-Ann Farrell that we removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

WE WILL rescind the following rule in our Policies and Procedures Handbook:

> No solicitation will be allowed in the Restaurants by either Goemon teammates or outsiders. This includes posting literature, signs, handouts or merchandising. If you see someone soliciting, please notify a manager immediately.
>
> Loitering is not permitted.

GOEMON AMERICA, INC.

Gerald Wolper, Esq., for the General Counsel.
Joel Shames, Esq., of Boston, Massachusetts, for the Respondent.
Lee-Ann Farrell, of Littleton, Massachusetts, in propria persona.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge in this case, filed on December 30, 1992, by Lee-Ann Farrell, an individual, was served by certified mail on Goeman America, Inc. (the Respondent), on December 30, 1992. An amended charge filed by Farrell on February 11, 1993, was served on the Respondent on February 11, 1993. A complaint and notice of hearing was issued on February 12, 1993. Among other things it was alleged in the complaint that the Respondent had unlawfully discharged Farrell for engaging in protected concerted activities and because the Respondent believed Farrell intended to file an unfair labor practice charge with the Labor Board, all in violation of Section 8(a)(1) and (4) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The matter came on for hearing in Boston, Massachusetts, on July 14, 1993.

All parties were afforded full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been been carefully considered.

On the entire record[1] in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT,[2] CONCLUSIONS OF LAW, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all material times, the Respondent, a corporation, with an office and place of business in Cambridge, Massachusetts (the Respondent's Cambridge facility), has been engaged in the operation of a restaurant.

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[1] At the hearing an amendment to the complaint was allowed in which it was alleged that the Respondent maintained an illegal no-solicitation rule.

[2] The facts found are based on the record as a whole and on the observation of the witnesses. The credibility resolutions have been derived from a review of the entire record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $500,000.

Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Cambridge facility goods and materials valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts.

At all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Facts*

Lee-Ann Farrell was employed by Respondent as a waitperson or a waitress on September 19, 1992. She ceased employment with the Respondent on December 22, 1992. She was termed a ''good waitress'' by Eleanor Arpino, a Respondent vice president.

On Saturday, December 19, 1992, the Respondent conducted an ''advanced training class to show our staff what our customers were seeing and perceiving from them and also, to show what the expectations of the customers were.'' Farrell, among other employees, was required to attend the meeting.[3]

According to Scott Hosker, general manager:

> We started off with the staff by giving them a booklet on articles we had found on improved service and customer expectations and we had done surveys with our customers and our frequent diners and friends of the restaurant as to what they had saw that was wrong or good in the restaurants and what they needed.
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> And we had written three skits, which four of us acted in these skits. The first being very poor customer service, the second being an order taker, just doing enough to get through the party, and the third being high quality customer service. Assisting the customer and sales in such, and educating the customer as well. And we did the three skits and we asked the employees to take notes on questions—our biggest thing was for them to pick up the cues on what we were doing, which turned out to be very successful.

The employees were also given a ''menu test.''

Three employees, including Farrell, failed to attend the meeting. All were given warning notices.

On December 21, 1992, at the end of Farrell's shift at 4 p.m., Hosker met with Farrell. Among other things Hosker told Farrell ''it was her responsibility to obtain information from the staff because she was responsible for knowing the information that [was given] at the meeting.'' Farrell told Hosker that she failed to attend the meeting because she had been ''out very late with a friend of hers the previous night and just could not make it in.'' Hosker cautioned Farrell that if she persisted in missing these mandatory meetings, ''it could lead to termination.''

The next morning December 22, 1992, around 12 o'clock, several employees, including Farrell, Dirk, the cashier, waitperson Lynn Perrone, and waitperson Lucio were engaged in a discussion at the pickup station. ''Gripes'' about working conditions were discussed. The training meeting was discussed. It was said that the meeting was ''boring and a waste of time''; ''they had better things to do that day and didn't learn much from the meeting because they had been with the company for a while thought they knew what they were doing.''

While the discussion ensued, Arpino approached and asked Dirk what he thought about the meeting. He replied that he thought it was great. Arpino asked Perrone the same question. Perrone answered, ''Well, I could see the point of view of the patrons, that the patrons' point of view.'' Arpino then pointed at Farrell, ''You have a bad attitude.[4] You're trying to cause trouble.'' Farrell denied the assertion and said ''because they're saying something different to you than they said to me doesn't mean that I'm lying.'' Farrell further testified credibly that Arpino said that Farrell was ''saying bad things about the company and making up stories about the meeting'' and that employees had told her (Farrell) that ''they had better things to do before Christmas, that, the meeting was too boring and that it was putting them to sleep.''

By this time, Farrell and Arpino were talking very loudly and Farrell ''was up against the wall.'' Arpino turned to Perrone and said, ''Well, thanks for lying to me''[5] and ''stormed back off to the office.''

Arpino described the incident:

> I approached Lynn and I think Dirk was there, but I'm not absolutely sure. But there was a couple of people, but I know Lynn Perrone was definitely there at the counter and so was Lee-Ann Farrell. At the pick up counter.
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> And I asked—I directed my question to Lynn about what she thought of Saturday's training meeting on December—19th. And she told me that she thought it was good to see the point of view of the customer and the way things should be done. And then I asked Dirk, and I, I don't recall him giving me an answer because he was, indeed, in the middle of doing something. . . . I asked Lyn if she thought it was beneficial and she said, ''Yes.'' And I said that I was glad because I had heard rumors that Lee-Ann said that everyone found it to be a waste of time. . . . And Lee-Ann immediately turned and said, ''That's right. Everyone does think it was a waste of time. They said it was boring that they were falling asleep. *And that it was inconsiderate of you to schedule a meeting so close to Christmas*.'' [Emphasis added.] And that it was unprofessional of me. And when I asked her that—I was a bit taken aback considering she did not even attend the meeting, so I asked her that that's unbelievable for her speak in terms of professionalism when she did not even attend a mandatory meeting.
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> And she said because she had better things to do and I told her that I felt that she was being unprofessional since she did not attend a mandatory meeting. She then

[3] The meeting was mandatory; employees were paid for this attendance.

[4] Perrone remembers that Arpino attributed a ''bad attitude'' to Farrell.

[5] Perrone corroborated this testimony.

> also told me that—everyone she spoke to said that if was a waste of time and I said, ''Everyone? How many people have you spoken to?'' And she said, ''Three or four.'' And I said, ''Well, considering there was almost 30 people there, I hardly think three or four constitute.''
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> She said, ''It's not my problem that they won't speak up to you and tell you the truth.'' And I, at that point, I said to her—she said, ''In fact, people right here are the ones that have told me that it was boring and a waste of time.'' And I turned to, I'm not sure, I know Lynn was there, but I'm not sure if Lucio, but I'm pretty sure that Lucio was also close by.
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> And I turned to them and I said, ''Well thanks a lot for not telling me the truth,'' because I had, you know, asked them what they thought of it and, at that point, I walked away.

Arpino testified that she had heard from other individuals that Farrell was talking about the meeting.

According to Hosker, Arpino had informed him that Farrell had been ''speaking negatively about the training class.'' According to Floor Manager Hernandez, Farrell's immediate supervisor, Arpino said that employees had heard Farrell saying that the ''meeting was a waste of time and everybody was falling asleep.''

About 10 or 20 minutes later Hernandez met with Farrell in the ''back room.'' Hernandez asked Farrell what occurred. Farrell responded that she and Arpino had ''like, argument . . . and . . . it wasn't right what Eleanor was doing to me.'' Hernandez told Farrell ''to just be quiet, not to say anything to Eleanor . . . to stay out of Eleanor's way.'' Hernandez also informed Farrell that Hosker was coming at 4 o'clock to have a meeting with Farrell. Hernandez and Farrell again met in the ladies' room at which time Hernandez again told Farrell to stay away from Arpino. Farrell said, ''Well, if I'm going to be fired, then they should fire me now instead of making me work out the rest of the day because I'm going right to the Labor Board[6] . . . because it was wrong what she was doing to me.

About 5 minutes later Hernandez approached Farrell and said that she needed to talk to her. She took Farrell to the manager's office. Farrell testified:

> When we were in the manager's office, first she said to me, ''I'm so sorry, Lee-Ann, I know we're friends, but I don't even know if I should say that, but I had to tell Eleanor what you told me, because if she knew that I knew what you said to me in the bathroom, then, about going to the Labor Board, then I would have been fired, too.''
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> And I said, ''well, am I fired? Am I fired?'' And she kept telling me how sorry she was, how sorry she was and I said, ''well, if I'm fired, I want my checks, I want my checks. I want a copy of the warning I was given yesterday and to cancel my tables'' or something. At that time she said, ''well, let's go to talk to Eleanor.'' And I was crying and I just went to the—I said, I can't. I went to the bathroom to wipe my face.
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> I asked her if I'm fired. . . . She didn't say anything. She, she said, ''Well, let's go talk to Eleanor.''

Farrell did not talk to Arpino because she was ''very upset.'' She ''was crying'' and she ''didn't want to let her see [her] that way.''

Farrell addressing Hernandez said, ''If I'm fired, then I want my checks.'' Hernandez went for the checks.

Farrell further testified:

> She pulled me into the employee coat room and she handed me the copy of the warning and one of my paychecks and said, ''You're not being fired for this warning, *you're being fired for the way you spoke to Eleanor*.'' And at that time I told her, ''Well, I want my other check.'' [B]ecause when you're fired, you have to have—you have to get all your pay right there, and she went to go get the other check for me. [Emphasis added.][7]

Farrell waited 10 or 15 minutes for her checks.

Perrone testified that Farrell told her before she left that ''she was fired for speaking incorrectly to Eleanor.''

Hernandez' testimony differed from Farrell's testimony in some respects. After observing the discussion between Arpino and Farrell, Hernandez inquired of Arpino what had occurred. Arpino informed her of ''what she heard about the negative comments about the meeting.'' Arpino also told Hernandez that she had heard that Farrell had told employees ''That the meeting was a waste of time and everybody was falling asleep.'' Hernandez then spoke with Farrell. During a second conversation, according to Hernandez, she told Farrell that Scott Hosker wanted to have a meeting with her at 4 o'clock. Farrell said, ''if it was to get fired that it wasn't fair. They, they should tell her right then instead of waiting until 4:00 o'clock.'' At a third conversation Hernandez told Farrell that she had no choice but to tell Hosker ''about what she said to me about suing the company.''

> We were in the, our office then I told her that I had no choice to tell them what she said to me and she got really upset and she took off her apron and she asked me for her paycheck and everything that she was going to leave right then.
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> And I told her that, you know, we were supposed to go into the corporate office and talk to Eleanor. But she didn't want to go into the corporate office and she wanted to leave right then because she was really upset.

Hernandez denied that she had told Farrell that she was terminated. Hernandez testified that Farrell was ''upset and she was crying'' and that Farrell took off her apron, ''*that she thought she was being fired*.'' (Emphasis added.) Hernandez did not ask Farrell ''to put her apron back on [again]'' or return to work.

Hosker testified that Arpino phoned him and informed him that Farrell was ''speaking negatively about the training class.'' Thereafter Hosker phoned Hernandez and requested a meeting with Farrell to find out what happened. Hernandez called Hosker back and informed him that when she informed Farrell that Hosker requested a 4 o'clock meeting

[6] Farrell was asked by Respondent's counsel ''why did you say Labor Board'' Farrell answered, ''Because it was my understanding that the Labor Board stuck up for employee's rights and I thought that Eleanor was going against my right to talk amongst my peers.''

[7] Hosker participated in furnishing information for this check.

Farrell said, ''Well, if he's coming back over to fire me, I'm going to sue the company.'' Immediately, Hosker called Arpino and told her of the ''threat of suit'' and that he would come to the restaurant. Before Hosker could leave he was informed that after Hernandez had told Farrell that she had conveyed her remarks about suing to her supervisors, Farrell ''took off her apron and demanded her paychecks.'' *According to Hosker, he was told by either Arpino or Hernandez that ''she had taken her apron off because she thought she was fired.*'' (Emphasis added.)

Arpino rated Farrell as a ''very good waitress.''

Although Arpino, Hosker, and Hernandez each were aware that Farrell thought she had been fired when she took her apron off, Farrell was not asked to don her apron and go back to work.

B. *Conclusions and Reasons Therefor*

First: The Respondent insists that Farrell quit and that it did not discharge her. Whether this assertion is well taken depends in part on whether I believe Farrell or Hernandez. In this respect I have evaluated the demeanor of the witnesses and weighed the logic of probability and I have concluded that Farrell is a truthful witness.[8] Moreover, Farrell believed that she was fired and Hernandez and Hosker believed that Farrell believed that she was fired.[9] Nevertheless, neither Hernandez nor any respondent representative asked Farrell to redon her apron and return to work. She was allowed, weeping, to collect her checks and leave. The attitude of the Respondent toward Farrell and Farrell's own actions are inconsistent with a finding that Farrell quit. Farrell removed her apron and left because Hernandez told her ''you're being fired.''

Second: The General Counsel claims that at the time of her discharge Farrell was engaged in protected concerted activity. Whether an employee engages in protected concerted activity depends upon whether the activity is wholly personal or whether the activity is wholly personal or whether it embraces potential group or group action. See *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); *Herbert F. Darling, Inc*., 287 NLRB 1356 (1988).

It seems obvious that Farrell was discussing matters of group concern. The training meeting was a mandatory condition of employment. Failure to attend the meeting was subject to disciplinary action. It is apparent that certain employees were not pleased in being required to attend a training session on the Saturday before Christmas; that to require their presence was deemed inconsiderate. Some, including Farrell, thought it was a waste of time. These matters were discussed by Farrell with other employees as well as other matters concerning other working conditions. Indeed Arpino had heard of these discussions and intervened in an employee discussion charging Farrell with bad-mouthing the training session and adversely influencing employees. Indeed, Arpino castigated Farrell for her riling other employees who, like Farrell, looked unfavorably on the training sessions. I find that the training sessions were of group concern. Employees were voicing unfavorable reactions in the nature of a protest in which an inducement to action was apparent. Because the training session was a condition of employment, employees' group discussions of the event in which Farrell participated, as well as Arpino, were protected, concerted activities. Cf. *NLRB v. Henry Colder Co*., 907 F.2d 765 (7th Cir. 1990). Thus an employee was insulated against discharge for participating in such activity. See also *Whittaker Corp*., 289 NLRB 933 (1988).

Third: The General Counsel also asserts that at the time of Farrell's discharge Farrell threatened to contact the Labor Board. In this respect Farrell insisted that she had used the words ''Labor Board'' whereas Hernandez was equally insistent that Farrell had said ''suing the company.'' Obviously if the words ''Labor Board'' were not used, the General Counsel's 8(a)(4) claim would fail.

As stated by the Board in *Roadway Express*, 108 NLRB 874, 875 (1954): ''[C]redibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe.''

In respect to demeanor, the Supreme Court has said in *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962): ''For the demeanor of a witness '. . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.'''

As noted above, I have carefully observed both Farrell and Hernandez and based on their demeanor I found that Farrell is the credible witness. Indeed, it would seem more likely that Farrell would have said ''Labor Board'' since she actually went to the Labor Board and it is generally known that the Labor Board is the agency to which workers take their complaints.[10] Whereas on the other hand Hernandez' testimony, ''suing the company,'' appears to have been a pat defense in this case which I find to be contrived.[11]

Fourth: The General Counsel contends that Farrell was discharged because she engaged in protected concerted activity and because the Respondent believed that she intended to file an unfair labor practice with the Board. According to Hosker, he was first activated to confront Farrell after Arpino reported that Farrell ''was speaking negatively about the training class.'' Thereafter Hernandez phoned Hosker and reported that Farrell said, ''Well, if he's coming over to fire me, I'm going to sue the company.''[12] Hosker phoned Arpino and stated the ''problem'' was ''getting out of con-

[8] The reliability of the uncorroborated testimony of an interested witness is generally open to question only where it is contradicted by the testimony of a disinterested witness, and not where the employer's contrary testimony is equally self-serving. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986).

[9] ''The test for determining 'whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employers to believe that they had been discharged.''' *Ridgeway Trucking Co*., 243 NLRB 1048 (1979). Here the circumstances were such as to lead Farrell to believe that she was discharged.

[10] Farrell testified that she said ''Labor Board'' because ''it was my understanding that the Labor Board stuck up for employee's rights.''

[11] I do not think that Farrell possessed the sophistication to have invented the story, whereas the Respondent's witnesses may have been well advised.

[12] I have found that the words ''sue the company'' were fabricated.

trol'' and he would be right over to meet with Farrell immediately. Shortly after this conversation, Controller Juan Baez called Hosker ''to get the payroll statistics on Lee-Ann from the previous week because she had taken off her apron and demanded her paychecks immediately.'' Hosker gave Baez the ''payroll figures.''

Hosker was told that Farrell was taking off her apron ''[b]ecause she thought I was going to fire her and she was going to leave.'' However, Hosker did nothing to dispel Farrell's belief. Indeed, he furnished information for her final check. He let her go with her thinking that she was fired. Additionally, it is uncontroverted that Hosker intended to confront Farrell immediately because she had threatened to go to the Labor Board. Except for Farrell's threat to go to the Labor Board and her engaging in protected concerted activity, the record is barren of any credible reason for her discharge.

A prima facie case, thus having been established by the General Counsel the burden shifted to the Respondent to prove that Farrell would have been fired even though she had engaged in protected concerted activities and threatened to go to the Labor Board. See *Wright Line*, 251 NLRB 1083 (1981).

The Respondent's defense is that Farrell voluntarily quit. I find no credible evidence to support this view. Farrell's participation in protected concerted activity and her threat to go to the Labor Board appear to have been treated by the Respondent as inextricable.

By discharging Farrell for engaging in protected activity, the Respondent violated Section 8(a)(1) of the Act, and by discharging Farrell for threatening to go to the Labor Board, the Respondent violated Section 8(a)(4) of the Act. Cf. *Overseas Motors*, 260 NLRB 810 (1982). The chilling effect of Farrell's discharge on the Respondent's employees was apparent.

Fifth: The Respondent's Policies and Procedures Handbook, which is in effect at the Respondent's facilities, contains the following rule:

> No solicitation will be allowed in the Restaurants by either Goemon teammates or outsiders. This includes posting literature, signs, handouts or merchandising. If you see someone soliciting, please notify a manager immediately.
>
> Loitering is not permitted.

This rule is overly broad in violation of Section 8(a)(1) of the Act in that employees may reasonably construe the rule to prohibit them from engaging in permissible union solicitation during nonworking time.[13]

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

2. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By unlawfully discharging Lee-Ann Farrell on December 22, 1992, for engaging in protected concerted activities for mutual aid and protection and for indicating that she would go to the Labor Board, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully discharged Lee-Ann Farrell on December 22, 1992, and failing to reinstate her in violation of the Act, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is also recommended that the Respondent offer Lee-Ann Farrell immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employee hired on or since the date of her discharge to fill the position, and make her whole for any loss of earnings she may have suffered by reason of the Respondent's unlawful acts detailed, by payment to her, a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of a valid offer of reinstatement, less her net interim earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Goemon America, Inc., Cambridge, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging lawful concerted activities of its employees in violation of Section 8(a)(1) of the Act by discharging its employees for engaging in concerted activities for their mutual aid and protection.

(b) Unlawfully discharging employees in violation of Section 8(a)(4) of the Act for representing that they would go to the National Labor Relations Board.

(c) Maintaining in effect an invalid no-solicitation rule.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[13] *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983), it was said: ''It is well settled that restrictions on union solicitation in nonworking areas during nonworking time are presumptively invalid.'' See also *Ichikoh Mfg.*, 312 NLRB 1022 (1992).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lee-Ann Farrell immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cambridge, Massachusetts, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''